FILE COPY

192

Office - Supreme Court, U.
FILED
OCT 4 1946
CHARLES ELMORE CROPL
CLE

749458
Supp. Ct.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 567.

JO VAN DER LOO, *Petitioner*,

v.

PAUL A. PORTER, PRICE ADMINISTRATOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

CHARLES W. ARTH,
JOHN L. LASKEY,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX.

	Page
PETITION FOR A WRIT OF CERTIORARI	1
I. Statement of the matter involved	1
II. Jurisdiction	2
III. Questions presented	2
IV. Reasons relied on for the allowance of the writ.	3
Prayer for Writ	3
BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	5
I. The opinion of the Court below	5
II. Jurisdiction	5
III. Statement of the Case	6
IV. Specification of errors to be urged	10
V. Argument	10, 12
Summary of Argument	10
Point A	10, 12
Point B	11, 18
Point C	11, 19
Point D	11, 21
Conclusion	23

TABLE OF CASES CITED.

Alan Levin Foundation v. Bowles, 152 F. 2d 467 3

Collins et al. v. Porter, U. S , 90 L. ed. 799 (Advance sheets) 3, 12, 15

Collins et al. v. Bowles, 152 F. 2d 760 ..... 16, 17

Conklin Pen Co. v. Bowles, 152 F. 2d 764 ..... 3, 15, 19

Consolidated Water Power & Paper Co. v. Bowles, 146 F. 2d 492 20

Page

Flett v. Bowles, 142 F. 2d 559 20
Hillcrest Terrace Corporation v. Brown, 137 F. 2d 663 20
Marlene Linens v. Bowles, 144 F. 2d 874 3
Montgomery Ward & Co. Inc. v. Bowles, 146 F. 2d 492. 22

TABLE OF STATUTES AND REGULATIONS CITED.

(Appendix*)

Emergency Price Control Act of 1942 as amended,
Sec. 203 (a) 24
Sec. 203 (d) 24
Sec. 204 (a) 24
Sec. 204 (c) 25
Sec. 204 (d) 25
Sec. 204 (e) (1) 26
Sec. 204 (e) (2) 26
Sec. 205 (a), (c), (d) 28

REVISED MAXIMUM PRICE REGULATION 330
Sec. 2 29
Sec. 3 29
Sec. 4 30
Sec. 7 35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. ————.

JO VAN DER LOO, *Petitioner*,

v.

PAUL A. PORTER, PRICE ADMINISTRATOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

The petitioner, Jo van der Loo, prays that a writ of certiorari issue to review the judgment of the United States Emergency Court of Appeals entered in the above case on September 5, 1946.

I.

STATEMENT OF MATTER INVOLVED.

This is a petition for certiorari to the United States Emergency Court of Appeals, to review, in the same manner as a judgment of a Circuit Court of Appeals as provided in Section 240 of the Judicial Code as amended, a

judgment of said United States Emergency Court of Appeals.

Said judgment dismissed petitioner's complaint brought in that Court under Section 204(a) of the Emergency Price Control Act of 1942 as amended, against the Price Administrator, Office of Price Administration, objecting to his denial of petitioner's protest brought under Section 203(a) of said Act to Revised Maximum Price Regulation No. 330 issued by said Price Administrator under said Act.

Said Regulation establishes ceiling prices for women's and misses' outerwear garments, which merchandise is dealt in by petitioner in her retail establishment in Washington, D. C. Petitioner contends that the Price Administrator has not correctly interpreted said Regulation as applied to her, and alternatively that if the Price Administrator's interpretation is correct the Regulation is invalid.

II.

JURISDICTION.

The judgment of the United States Emergency Court of Appeals was entered on September 5, 1946 (R. 49). This petition is filed October 5, 1946.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 204(d) of the Emergency Price Control Act of 1942, as amended (Act of January 30, 1942, c. 26, Title III, Section 306, 56 Stat. 37.)

III.

QUESTIONS PRESENTED.

1: Does the United States Emergency Court of Appeals have the right to refuse to pass upon an administrative interpretation of a Regulation on the sole ground that, subsequent to the protest of this interpretation, enforcement proceedings were instituted in the District Court?

2: Is a Regulation which unreasonably requires the selling of goods at prices less than their lawful cost to the seller a valid Regulation?

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

Petitioner contends that the petition for a writ of certiorari to the United States Emergency Court of Appeals should be granted, for the following reasons:

1: Said United States Emergency Court of Appeals in its decision herein (R. 45) has not given proper effect to an applicable decision of this Court, in the following case:

> *Collins et al.* v. *Porter,* U. S. , 90 L. ed. 799 (advance sheets), decided April 22, 1946)

2: The decision of the United States Emergency Court of Appeals herein (R. 45) is in conflict with its decisions in the following cases:

> *Marlene Linens* v. *Bowles,* 144 F. 2d 874 (E. C. A. 1944);
> *Alan Levin Foundation* v. *Bowles,* 152 F. 2d 467 (E. C. A. 1945);
> *Conklin Pen Company* v. *Bowles,* 152 F. 2d 764 (E.C.A. 1946).

3: Said United States Emergency Court of Appeals in its decision herein (R. 45) has decided an important question of federal law which has not been, but should be, settled by this Court.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Emergency Court of Appeals, commanding that court to certify and to send to this Court for its review and determination, on a day

certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 318, *Jo van der Loo, complainant,* v. *Paul A. Porter, Price Administrator,* and that the judgment of said United States Emergency Court of Appeals in said case may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

JO VAN DER LOO,
By CHARLES W. ARTH,
JOHN L. LASKEY,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

JO VAN DER LOO, *Petitioner,*

v.

PAUL A. PORTER, *Price Administrator.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the United States Emergency Court of Appeals is as yet unreported officially; it was filed September 5, 1946 (.... F. 2d ....). It is found in the Record on pages 45 to 48, inclusive.

The opinion of Paul A. Porter, Price Administrator, was filed February 12, 1946; it is found in the Record on pages 23 to 27, inclusive.

II.

JURISDICTION.

The judgment of the United States Emergency Court of Appeals was entered on September 5, 1946 (R. 49). This petition is filed October 5, 1946.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 204(d) of the Emergency Price Control Act of 1942, as amended (Act of January 30, 1942, c. 26, Title III., Sec. 306, 56 Stat. 37).

III.

STATEMENT OF THE CASE.

Petitioner, Jo van der Loo, is a retail dealer in women's and misses' apparel, doing business at 1739 Connecticut Avenue, N. W., Washington, D. C.

The Regulation protested is Revised Maximum Price Regulation No. 330, issued September 13, 1944, under the provisions of the Emergency Price Control Act of 1942, as amended.

Said Regulation (Section 2, App. 29) established as maximum prices which might be charged for women's and misses' outerwear those prices at which each individual seller made the largest number of deliveries of garments of the same cost and in the same category during the base period from August 1 to December 31, 1941. Each seller was required to file a pricing chart (Section 3, App. 29) showing, by category, each cost price paid for garments sold during that period and the price at which the largest number of garments in each cost price line was delivered, and then to calculate the resulting "percentage markup" taken on each such selling price. These "percentage markups" established the retailers "ceiling price" for each item. In each category, for cost lines not handled during the base period, the Regulation allowed the average markup for any higher than the highest on the chart, the markup for the lowest item for any lower in cost than the lowest shown, and the markup of the next lower cost line for any between the highest and the lowest. (Sections 3, 4, App. 29-35).

In 1938 petitioner established her retail shop for the sale of women's and misses' outerwear garments. Because of inexperience, she became overstocked with garments of

various cost lines not properly selected for her type of establishment and as a result, during the summer of 1941 she found herself with an unbalanced and slowly-moving inventory. On advice of an expert in retail sales of women' and misses' apparel, she initiated a reduced price sale to liquidate her then inventory at prices reduced from 35% to 60%, in order to re-stock with merchandise better selected for her type of trade. The period covered by said sale extended from the last few days in July until December 29, 1941, a period practically coincident with the base period long thereafter selected by said Regulation No. 330. Many items were disposed of at prices less than cost, others at markups from 2 to 13 per cent. from cost, and a number of other garments were sold at reduced prices because damaged or soiled. During said period she sold 548 garments covered by said Regulation, over 200 of which were at greatly reduced prices. (R. 2, 16). In many cost lines, such reduced price sales were the only sales, or the majority of sales, made during the base period. Said sales did not represent usual or customary sales, or reflect the structure of retail markups in a typical selling period, but represented an emergency measure, made necessary by the condition of the petitioner's inventory.

The above facts were admitted by the answer of the Price Administrator (R. 33-34, 40).

In connection with the preparation and filing of her pricing chart (R. 28-29) under said Regulation, petitioner reported to the District of Columbia Office of the Office of Price Administration the facts above stated, asked that office for answers to certain specific questions, and requested an interpretation of said Regulation which would afford her relief from the requirement of selling many of her usual cost lines of merchandise at prices below the normal markup prevalent in the industry and in many instances below cost. In reply to said request, said Office of Price Administration placed an interpretation upon said Regulation requiring petitioner to accept said below-cost

sales and sales of damaged or soiled merchandise, made outside the usual course of business, as establishing ceiling prices for all subsequent sales. (R. 7-10, 34, 40).

As a result of the foregoing, petitioner's pricing chart under said Regulation, prepared pursuant to such interpretation of the provisions of said Regulation, contains in several categories a number of cost lines in which, instead of applying a "markup" to the cost of a garment to be priced, she is required to take as her ceiling price for all future sales the markdown price, which in many cases is below the cost of the item to her, and in others so slightly above cost as to make the handling of such garments unprofitable (R. 34-35).

On June 13, 1945, petitioner filed with the Price Administrator, under the provisions of Section 203(a) of said Act, her protest of said Regulation No. 330 as interpreted and applied to her by said Price Administrator. Said protest was assigned Docket No. 1330-19-P (R. 1). Thereafter petitioner furnished additional evidence in affidavit form in connection with her said protest (R. 13-21).

On February 12, 1946, the Price Administrator entered in said cause an order denying the protest and filed an opinion in support of said order (R. 22-27). (Date of service and effective date of judgment was February 13, 1946 —R. 41-43).

On March 15, 1946, petitioner as complainant filed in the United States Emergency Court of Appeals, under the provisions of Section 204(a) of said Emergency Price Control Act of 1942, as amended, her complaint specifying her objections to said denial of her protest, and seeking a determination by said Emergency Court of Appeals that said Regulation No. 330 as interpreted and applied by said Price Administrator to her business is invalid, and further seeking an interpretation and application of said Regulation which will be fair and equitable and will effectuate the purpose of said Act. (R. 31).

On September 5, 1946, said United States Emergency Court of Appeals entered an order dismissing petitioner's said complaint, and filed an opinion in support of said order (R. 45-49).

This petition is filed under Section 203(d) of said Emergency Price Control Act of 1942, as amended, for a review of said judgment of the United States Emergency Court of Appeals.

Although not a part of the record herein, or of the record before the said United States Emergency Court of Appeals, certain proceedings in the District Court of the United States for the District of Columbia were mentioned in the pleadings before the Emergency Court of Appeals and are referred to in its opinion; and the action of said District Court in the proceedings before it was by said Emergency Court of Appeals apparently taken as one of the bases for its decision and for the judgment here involved. As an explanation of the references to said District Court proceedings appearing in the opinion (R. 45-48) petitioner recites the following additional facts:

After petitioner filed with the Price Administrator her protest of Revised Maximum Price Regulation No. 330 as interpreted and applied to her by the Administrator (R. 1-12), and on July 26, 1945, said Administrator filed with the District Court of the United States for the District of Columbia, in Civil Action No. 29,900, a complaint for injunction and treble damages against petitioner as defendant, charging her with violations of said Regulation. Before the Price Administrator passed on said protest, the District Court on December 11, 1945, filed a memorandum opinion, and on January 3, 1946, entered judgment, restraining petitioner as defendant from violation of said Regulation, but finding that she had acted in good faith, and denying the damages claimed against her. Petitioner as defendant within five days after said judgment moved for a stay thereof, under Section 204(e) (2)(iii) of said Emergency Price Control Act as amended (App. 26-28),

during pendency of a proceeding to be instituted by her in the Emergency Court of Appeals under Section 203(d) (App. 25) of said Act because of the undue delay of the Administrator in disposing of her protest. Said District Court on March 7, 1946, granted such stay, and, as required by Section 204(e) (2) of said Act, issued a temporary injunction enjoining, during the period of the stay, violations by petitioner as defendant of any provision of said Regulation. Meantime the Administrator had denied the protest, and the proceedings in the Emergency Court were instituted to review that denial.

IV.

SPECIFICATION OF ERRORS TO BE URGED.

1: The United States Emergency Court of Appeals erred in refusing to pass upon the administrative interpretation of the Regulation.

2: The United States Emergency Court of Appeals erred in failing to hold that the Regulation as interpreted by the Price Administrator was invalid.

3: The United States Emergency Court of Appeals erred in dismissing the complaint.

V.

ARGUMENT.

Summary of the Argument.

Point A.

The United States Emergency Court of Appeals was in error in refusing to pass upon the Price Administrator's interpretation of the Regulation. In so doing, it in effect refused to pass upon the validity of the Regulation as interpreted, and so refused to perform the function which Congress directed it to perform.

Point B.

The interpretation of the Regulation contended for by the Price Administrator is not a proper interpretation, since the entire theory of the Regulation as drawn is the perpetuation of customary markups existing during the base period, and not the freezing of below-cost selling prices resulting from unusual circumstances. The elimination of below-cost and abnormally low sales from the pricing chart would not free any cost lines from price control, since the Regulation provides means for pricing all cost lines.

Point C.

As interpreted and applied by the Price Administrator, the Regulation is invalid, not being in accordance with law, and being arbitrary and capricious, in that as interpreted and applied it would compel petitioner either to refrain from dealing in a substantial number of cost lines of garments within the normal scope of her business, or to sell those cost lines at a price below the lawful cost to her. In either event, the Regulation as interpreted and applied imposes upon petitioner and others similarily situated a competitive disadvantage not necessary to effectuate the purposes of the Act.

Point D.

The failure of the Regulation to provide any adjustment provisions applicable to situations similar to petitioner's is unnecessary and arbitrary. The inclusion of adjustment provisions in other Regulations with a similar scope and coverage establishes that the inclusion of such provision in this Regulation would not be administratively impossible, or impose unnecessarily severe burdens on the Price Administrator.

ARGUMENT.

A. The relief sought by petitioner in the Emergency Court of Appeals was a review, under Section 204(a), of her protest filed with the Price Administrator under Section 203(a), of the Emergency Price Control Act of 1942 as amended.

Petitioner sought in the Emergency Court of Appeals, under Section 204(a) of the Emergency Price Control Act of 1942 as amended, a review of the Administrator's denial of her protest, and had the protection of the District Court's action, under Section 204(e) (2) of said Act, in staying its judgment in the injunction case, pending complaint to the Emergency Court. Said stay was requested, under Section 204(e)(2)(ii), during the pendency of petitioner's protest, to allow a proceeding under 203(d) for an order to require the Administrator to act on the protest; meantime he denied it, and therefore the stay when granted came under the provision of Section 204 (e) (2)(iii). But petitioner's right to proceed under Section 204(a) was not and could not be limited by events occurring subsequent to the institution of her protest. This Court has held in *Collins et al.* v. *Porter,* .... U. S. ...., 90 L. Ed. 799 (advance sheets), No. 393, decided April 22, 1946, that the remedies by procedure under Sections 204(a) and 204(e) are cumulative and not alternative.

The record of these proceedings in the Emergency Court of Appeals shows that the requirements of Section 204(a) are followed in the complaint as well as in the further proceedings in that court. Said record includes the complaint of petitioner as a person aggrieved by a denial of a protest (Sec. 204(a) of the Emergency Price Control Act of 1942 as amended) (R. 31); the transcript of the proceedings before the Price Administrator on the protest (R. 1-30), and the Administrator's answer to the complaint (R. 39-41). Said record contains no part of the proceedings in the District Court in the injunction suit under Section 205 of said

Act, and no indication of application for leave to introduce additional evidence (Sec. 204(a), App. 24-25). As part of the historical background of the situation involving petitioner, the Administrator, and Revised Maximum Price Regulation No. 330, petitioner's complaint recited the Administrator's suit for injunction and damages filed after the filing of her protest, the judgment of the District Court enjoining violation of the Regulation but refusing to assess damages, and the stay of that judgment on petitioner's application pending her proceeding in the Emergency Court of Appeals with a complaint (R. 31-32). The Administrator's answer (R. 40) admitted those allegations of the complaint and affirmatively stated that the Administrator had appealed from that portion of the judgment which denied treble damages and petitioner had appealed from that portion which granted the injunction (R. 40).

The District Court judgment was, as recited in the pleadings herein, taken by both parties by appeal to the United States Court of Appeals for the District of Columbia, and as noted in the opinion (R. 46) those appeals are now pending.

Only one proceeding was before the Emergency Court for review, as pointed out in the Administrator's brief in that court, and that was petitioner's complaint to review the denial of her protest, which objected to the Administrator's interpretation and application of the Regulation and contended that as so interpreted and applied to her the Regulation was invalid. No review was sought to the Emergency Court of the District Court's action; such review, under Section 204(e)(1), was not available to petitioner, since it may be taken only by leave of the District Court after its finding of good faith of the complainant and in a case in which a protest has not been filed.

The fact that the District Court granted a stay pending action in the Emergency Court does not bring before the latter court any of the actions of the former. The statute provides for stays to suit the varying situations, and it

also requires a temporary restraining order enjoining violations of any provision of the Regulation involved, during the period of the stay.

The Emergency Court of Appeals in its opinion refuses to interpret the Regulation, on the assumption that its action would not bind the District Court and would leave petitioner in a dilemma. Such is not the fact. As the record in this case shows, the Price Administrator's interpretation of the Regulation is in effect an order of the Price Administrator and becomes a part of the Regulation essential to a consideration of questions arising from the application of the Regulation to petitioner's business. Hence if the Emergency Court decided that the interpretation contended for by the Administrator was invalid, it would to that extent find the Regulation as interpreted to be invalid; that decision would bind the District Court and under the terms of the Emergency Price Control Act the enforcement proceeding pending upon such invalid interpretation would have to be dismissed and any judgment previously entered vacated.

The interpretation of the Regulation, therefore, is under the exclusive jurisdiction of the Emergency Court, and it was wrong in renouncing its jurisdiction in favor of the District Court.

The Emergency Court of Appeals has apparently assumed that it has before it for consideration and review both the action of the United States District Court for the District of Columbia and the action of the Price Administrator on petitioner's protest, in the two separate proceedings involving petitioner.

The opinion recites the action in the protest proceedings, and also sets out the filing of the suit for injunction and treble damages, the filing of the court's memorandum opinion (not mentioned in the Record) and the issuance of a permanent injunction against "further" violations of the Regulation—(there is no record basis for the use of the word "further"). It recites the appeals to the United

States Court of Appeals for the District of Columbia, "where they are now pending"; and apparently having in mind a proceeding under Section 204(e)(1), says the District Court granted "leave within thirty days" to file a complaint in the Emergency Court. Then from its apparent assumption as to the contents of the memorandum opinion and injunction, it concludes that the District Court had passed upon the interpretation of the Regulation and rejected petitioner's contention on that point, although it found petitioner had acted in good faith; and it assumes without any basis in the record that the District Court found that petitioner herein, defendant in the District Court, had made sales above established ceilings. (R. 46).

The Emergency Court then cites its former decision in *Conklin Pen Company* v. *Bowles*, 152 F. 2d 764 (E. C. A. 1946) as authority for holding:

> "* * * where a District Court in an enforcement proceeding has interpreted a regulation as being applicable to one who later complains to this Court that the regulation is invalid, we must accept the District Court's interpretation."

That use of language from the *Conklin Pen Company* case not only ignores the statements of this Court that procedures for review are cumulative and not alternative (*Collins et al.* v. *Porter, supra*), but also takes that language out of its context in the *Conklin* case, where it was used in describing a proceeding under Section 204(e) (1) of the Act. The Court said (152 F. 2d 766):

> "* * * where, as in this case, a protestant to whom a regulation has been construed by the Administrator to be applicable, asserts that if applied to him the regulation is invalid and at the same time contends that properly construed it is inapplicable to him, we think that he has the right to have the question of the proper meaning and interpretation of the protested regulation passed on in the protest proceedings and on review in this court. * * *

"A case filed in this court under Section 204(a) is a judicial review of the Administrator's action in denying the protest. It would be strange indeed if in such a proceeding the reviewing court were bound by the determination of the officer whose action is being reviewed as to the meaning of his regulation or order. For those acts have the force of law and their construction involves a question of law just as much as does the interpretation of a statute. Moreover, it is a question which may involve the standing of the complainant to maintain his suit. It is for these reasons that this court has held that in such a case we have power to determine whether the regulation under attack may fairly be interpreted as applying to the complainant before we decide the questions of validity which he raises. Alan Levin Foundation v. Bowles, F. 2d (E. C. A. 1945).

"A case brought to this court under Section 204 (e) (1) of the Act is in quite a different category. Such a case is not in any true sense an appeal from an action of the Price Administrator but, on the contrary, is merely ancillary to another suit which has been brought against the complainant in another court. In such a case the jurisdiction of the Emergency Court of Appeals is invoked by the complainant only with leave of the court in which the litigation is pending. It is invoked primarily for the purpose of enabling the complainant to establish the invalidity of the regulation involved in that litigation as a defense to be presented in that court. See Section 204 (e) (2) of the Act. Except for the prohibition of Section 204 (d) the defense could and would have been established in the primary court. But the complainant still has full opportunity to raise in that court the question of the applicability of the regulation and have it there judicially decided. Accordingly we have held in such a case that this court will accept the construction which the enforcement court has placed upon the regulation in question and will consider merely its validity as thus interpreted. Collins v. Bowles, —— F. 2d. —— (1946)."

Collins et al. v. *Bowles,* 152 F. 2d, 760, (decided by the Emergency Court of Appeals January 10, 1946), cited as upholding the opinion, was considered by this Court in its

review on certiorari of the decision of the Emergency Court of Appeals in an earlier case brought there by the same complainants—*Collins et al.* v. *Bowles*, — U. S. —, 90 L. ed. 799, *supra*.

In the *Collins* case, the Administrator brought suit for treble damages, which suit was still pending; thereafter petitioners sought by protest to the Administrator under Section 203(a) of the Act to have the Regulation declared invalid or inapplicable. The Administrator dismissed the protest; petitioners went to the Emergency Court of Appeals, which dismissed the complaint without opinion, and this Court granted certiorari. Meantime petitioners obtained leave of the trial court in the treble damage case to file a complaint with the Emergency Court under Section 204(e) of the Act, and the Emergency Court on January 10, 1946, (152 F. 2d. 760) sustained the validity of the Regulation, but refused to pass upon its applicability to petitioners. On this Court's review on certiorari of the first decision it was said (p. 801):

> "The petitioner in this case had a right to have his protest considered by the Administrator and, in case of denial, to resort to the Emergency Court of Appeals. The fact that Congress in 1944 gave a limited opportunity to go to the Emergency Court by leave of the District Court before which an enforcement proceeding is pending, Sec. 204(e), neither repealed nor qualified the protest proceeding originally designed by Section 203(a). The two modes of securing a hearing on the validity and applicability of the price regulation are cumulative and not alternative. * * *
>
> "Judgment reversed."

Petitioner's case stands in somewhat better position than the *Collins* case, since her protest was filed before the Administrator instituted his treble damage proceeding, now pending in the Court of Appeals, the decree of the District Court having been stayed.

B. The interpretation advanced by the Administrator is not a proper interpretation of the Regulation.

Revised Maximum Price Regulation No. 330 as drawn does not require sales of goods, lawfully purchased under price control, at prices below cost to the seller. The Administrator by interpretation has sought to amend the Regulation and include such a requirement. This he should not be permitted to do.

The Regulation provides that one subject to it should find his ceiling prices

> "by calculating the markup which (he) took on garments (he) delivered during the base period and then applying that markup to the cost of the garment (he is) pricing." (Section 2).

The Regulation further states under Section 3:

> "In order to price under this Regulation you must have a pricing chart",

and gives with particular detail the items which must be contained in the chart. One very essential item to be contained in the chart is

> "the percentage markup taken on each selling price."

Thus it appears that items sold below cost during the base period should not and cannot under the terms of the Regulation be included in the pricing chart. It would be entirely consistent with the Regulation to omit those items entirely from the pricing chart, as in the case of lines in which no sales were made during the base period—to treat those sales as not constituting a basis for fixing future selling prices. This does not mean that such items would be sold without the restrictions of price control. The Regulation does not contemplate that every cost line or item sold must be one for which there was a comparable sale during the base period, but it provides rules for pricing, under the

terms of the Regulation, any and all cost lines and items not appearing on the chart. (App. 29-35).

The interpretation for which petitioner contends is further compelled by the entire theory of the Regulation, which is that of applying a "markup" customary during the base period. The Regulation throughout uses the terms "markup", "percentage markup" and terms of similar import, referring to the method of arriving at a selling price by applying a percentage markup over cost.

Petitioner's situation is similar to, though not the same as, the complainant's situation in *Conklin* v. *Bowles, supra.* The Regulation has been interpreted to her, and her contention is, not that as properly interpreted the Regulation is inapplicable to her, but that, as properly interpreted, the Regulation does not compel her to conduct her business in the manner contended for by the Price Administrator.

To adopt the Administrator's interpretation would be artificial and contrary to the plain intendment of the Regulation and the Act.

C. As interpreted by the Price Administrator, the Regulation is invalid, in that it arbitrarily places the petitioner at a competitive disadvantage with other retailers.

Under the Price Administrator's interpretation, petitioner is told in so many words that she must handle certain cost lines of garments at a loss or refrain from handling those cost lines at all. Nowhere does it appear that these cost lines are not normally purchased and sold by competing retailers, and nowhere does it appear that the purchase by petitioner of these cost lines would be at prices other than the lawful ceiling prices of her suppliers.

While such an interpretation seeks to assume the guise of reasonableness by giving the complainant alternative courses of conduct, it is in fact unreasonable, arbitrary and capricious, in that each alternative precludes her participation in a legitimate field of merchandising, even though she

seeks to participate in such field in a manner consistent with the purposes and objectives of the Price Control Act. Such a result is not required by the Act, and has not been approved by the Emergency Court of Appeals nor by this Court.

In *Consolidated Water Power & Paper Co.* v. *Bowles*, 146 F. 2d. 492 (E. C. A. 1944) the Company protested a regulation, charging that if the Administrator's interpretation was correct, then the Regulation was invalid. The Administrator denied the protest, and the Company brought a declaratory judgment suit in the District Court and also filed a complaint in the Emergency Court challenging the interpretation of the Regulation and attacking its validity as so interpreted. The declaratory judgment suit was dismissed, and thereafter the Emergency Court considered and accepted the Administrator's interpretation, and found that the Regulation as so interpreted as invalid.

The Emergency Court in *Flett* v. *Bowles*, 142 F. 2d 559 (E. C. A. 1944) held the provision in question subjected complainant to a competitive handicap,

> "which was not characteristic of the industry prior to price control, and which, so far as this record discloses, is wholly unnecessary for the effectuation of the purposes of the Act."

It therefore declared the Regulation arbitrary and discriminatory and not in accordance with law.

In *Hillcrest Terrace Corporation* v. *Brown*, 137 F. 2d 663, 667, (E. C. A. 1943) complainant's rents at the rent-freezing period were temporarily reduced by a real estate tax exemption. The Administrator denied the protest seeking amendment of the adjustment provisions of the Regulation, none of which exactly fitted the state of facts. On complaint to the Emergency Court, it was held that the rents charged during that period were not the product of general market conditions of supply and demand on that date, and remanded the case to the Administrator to devise an amendment which would cover the situation.

From the facts appearing in the opinions, neither of the three cases last cited appears to involve a concern which was a representative of a class, or a regulation which itself had dealt with individual concerns. They each appear to be cases in which the Administrator's interpretation of a regulation and its application to a complainant was arbitrary and capricious.

Petitioner has suffered serious inconvenience and financial hardship in her business as the result of the Administrator's interpretation of Regulation 330, under which she is required to accept as her ceiling price, for a number of lines, prices less than the cost under price control, and she is precluded from handling those usual and customary cost lines of the trade which are available to and handled by her competitors at normal profitable markups.

The Emergency Court's opinion criticises the fact that the net profits of petitioner's business as a whole during the time the Regulation has been in effect are in excess of those in previous years (R. 48). A new business started in 1938 would not make in its earlier years the profits to be expected after it had become established and a clientele had been built up. Her highest profit was a little over $9,000.00 a year; her net profit for the six months ending June 30, 1945, $3,624.35. Those figures are before deduction of any compensation for the services of petitioner, who does all the buying, and as active supervising manager devotes her entire time to the operation of the business (R. 15, 17-21).

D. The failure of the Regulation to include any adjustment provision renders it unreasonable and arbitrary.

At the times of the filing of the protest and the complaint herein the Regulation contained no provision for adjustment. Thereafter the Price Administrator on April 11, 1946, issued Amendment 5 to the Regulation, effective April 16, 1946, providing a method for adjustment of abnormally low markups and for the exclusion of below-cost sales in calculating average markups for the purpose of the amend-

ment. In so far as petitioner seeks prospective relief, that amendment might be construed as extending it to her. However, she is here faced with a situation with which the Emergency Court dealt in the case of *Montgomery Ward & Co., Inc.* v. *Bowles*, 146 F. 2d 492 (E. C. A. 1944). In that case the Emergency Court continued with the consideration of a complaint protesting the highest price line provision of this very Regulation, even though the Stabilization Extension Act of 1944 has compelled the elimination of such provision. The reason for continuation was that enforcement proceedings based upon the objectionable feature of the Regulation were pending. That situation is present here, since we have enforcement proceedings pending in the United States Court of Appeals for the District of Columbia, in which the allegations of violations contended for by the Price Administrator are based upon the protested Regulation as interpreted and applied by him before the effective date of Amendment 5 to the Regulation.

Amendment 5 conclusively shows that adjustment provisions to Regulation 330 are administratively feasible and are consistent with the theory and purposes of the Act and the Regulation.

Even without that amendment, however, the Administrator has publicly acknowledged that such adjustment procedure is not only feasible but necessary to prevent unfairness and inequity. Maximum Price Regulation 580 is similar to Revised Maximum Price Regulation 330 in that it deals with apparel, is of the same general type, and covers the same or similar retailers; it requires a pricing chart, has a base date, and determines ceilings by the application of pricing rules to the pricing chart. Amendment 1 to Maximum Price Regulation 580, issued March 30, 1945, effective April 4, 1945, provides in part:

> "(i) To avoid the distortion caused by markdowns you may list as your offering price for an article either the price at which you actually offered it on the base date, or the price at which you offered that article when you first offered it for sale. However, if you can

not determine the price at which you offered the article when you first offered it for sale, you may ignore that article in preparing your chart."

In the Statement of Considerations accompanying this amendment the Administrator acknowledged the disruptive effect upon sellers, subject to the regulation, of occasional markdowns of merchandise because it was damaged, soiled or obsolete, or because it was out of season, or for other reasons. The Administrator further recognized that on the base date some sellers were engaged in store-wide sales, and speaking of this circumstance he said it was clear that the provisions of the Regulation arbitrarily penalized a few individuals. Those admissions of the Price Administrator, belated as they may be, are sufficient for this division of the argument.

VII.

CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the United States Emergency Court of Appeals may be required to give proper effect to the applicable decisions of this Court, and that the decisions of that court may be settled and harmonized; and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Emergency Court of Appeals and finally reverse it.

CHARLES W. ARTH,
JOHN L. LASKEY,
Counsel for Petitioner.

APPENDIX.

Emergency Price Control Act of 1942, as amended.

SEC. 203. (a) At any time after the issuance of any regulation * * * any person subject to any provision of such regulation * * * may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. * * * Within a reasonable time after the filing of any protest under this subsection, but in no even more than thirty days after such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. * * *

(d) Any protest filed under this section shall be granted or denied by the Administrator, or granted in part and the remainder of it denied, within a reasonable time after it is filed. Any protestant who is aggrieved by undue delay on the part of the Administrator in disposing of his protest may petition the Emergency Court of Appeals, created pursuant to section 204, for relief; and such court shall have jurisdiction by appropriate order to require the Administrator to dispose of such protest within such time as may be fixed by the court. If the Administrator does not act finally within the time fixed by the court, the protest shall be deemed to be denied at the expiration of that period.

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation * * * protested be enjoined or set aside in whole or in part. * * * Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation * * *, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation * * * may be modi-

fied or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation * * *, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which * * * could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation * * * as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

* * *

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, * * *.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of * * * any provi-

sion of any such regulation * * *. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e)(1) * * * within five days after judgment in any civil * * * proceeding, brought pursuant to section 205 involving alleged violation of any provision of any regulation or order * * *, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203(a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 involving an alleged violation of any provision of any such

regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this

subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

* * *

(c) The district courts shall have jurisdiction of criminal proceedings * * * and * * * of all other proceedings under section 205 of this Act. * * *

(d) No person shall be held liable for damages or penalties in any Federal * * * court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, * * * notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid. * * *

Revised Maximum Price Regulation 330—Retailers' and Wholesalers' Prices for Women's, Girls', Children's and Toddlers' Outerwear Garments.

* * *

SEC. 2. *How to find your ceiling prices under this regulation.*—(a) *Explanation of rules.* You find your ceiling price under this regulation by calculating the markup which you took on garments you delivered during the "base period", and then applying that markup to the cost of the garments you are pricing. * * *

(c) * * * (2) * * * (i) The "base period" for retailers is the period between August 1 and December 31, 1941; * * *.

SEC. 3. *Pricing charts.* In order to price under this regulation you must have a pricing chart. * * * On or before October 15, 1944, every seller subject to this regulation * * * must file two signed copies of a pricing chart with the Office of Price Administration * * *. You must keep a copy of the pricing chart for your own use. * * *

(a) *How to prepare a pricing chart.* Each pricing chart must contain the following:

(1) The seller's name and address.

(2) Type of seller * * *.

(4) A list of the categories you delivered during your base period.

(5) A list of the cost prices at which you purchased garments in each of these categories. * * *

(6) The discount, terms of allowance at which you purchased the largest number of garments at each cost price listed in (5). * * *

(7) The selling price at which you delivered, during the base period, the largest number of garments of each cost price listed in (5). If during the base period you delivered

an equal number of garments at two or more different selling prices, list the lowest of these selling prices. * * * .

(8) The percentage markup taken on each selling price listed in (7).[2]

* * *

2. Any percentage markup authorized for a particular cost price and/or category by an order granting an adjustment under MPR 153, as amended, shall be deemed to be the percentage markup taken by the seller on the largest number of garments of that cost price and/or category delivered during the base period.

Selling price lines and percentage markups of sellers who made their first deliveries after June 15, 1942 may be revised at any time by the OPA * * *.

NOTE: Throughout this regulation, reference is made to categories, prices and markups listed on the seller's pricing chart. * * *

* * *

(b) How to amend a pricing chart. * * * However, until you have received an acknowledgment from the OPA of the receipt of this amended pricing chart, you must not take a higher percentage markup than that previously reported, or permitted under this regulation, whichever is lower.

SEC. 4. *Pricing rules.*—(a) *Summary of pricing rules.* In order to find your ceiling price for a garment, you use whichever of the four following pricing rules is applicable. * * *

(1) *Rules 1 and 2.* You first look at your pricing chart to find whether the category of garment which you are pricing is listed on the chart. If it is, you find your ceiling price by using Rule 1 or 2.

(2) *Rule 3.* If the category is not listed on your pricing chart you use Rule 3. * * *

(b) * * * (1) Rule 1. *Garments purchased at a cost price listed on the seller's pricing chart.* The ceiling price for a garment which has a cost to you the same as a cost price listed for that category on your pricing chart is the selling price listed for that cost price on your chart. * * *

(a) Rule 2. *Garments purchased at a cost not listed on the seller's pricing chart*—(i) *Garments purchased at a cost higher than any listed on the seller's pricing chart.* The ceiling price for a garment whose cost is greater than the highest cost price listed for the same category on your pricing chart is calculated by applying to the cost of the garment you are pricing the "average percentage markup" for that category. The "average percentage markup" is found by adding together all the cost prices listed for a category, adding together all the selling prices listed for that category, and then dividing the difference between these totals by the total of the selling price.

For example: The retailer whose pricing chart is shown in appendix B(a)(1) wishes to find his ceiling price for a woman's dress (Category 21) which he purchased for $12.75. Since the highest cost price listed for women's dresses on his pricing chart is $10.75, he must price under Rule 2(i). To find his average percentage markup for women's dresses he first adds together the cost prices listed for women's dresses (* * * $50.00); then he adds together the selling prices listed for those cost prices (* * * $79.68); next he subtracts the total of the cost prices from the total of the selling prices * * * finally, he divides the remainder just obtained by the total of the selling prices ($29.68 ÷ $79.68 = 37.2%). His average percentage markup is therefore 37.2%, and he finds that his ceiling price for his $12.75 cost dress is $20.30 by subtracting 37.2% from 100% * * * and dividing the cost by the remainder ($12.75 ÷ 62.8% = $20.30). Note that this retailer will use the same average percentage markup of 37.2% in pricing all women's dresses costing more than $10.75.

(ii) *Garments purchased at cost prices lower than any listed on the seller's pricing chart.* Your ceiling price for a garment whose cost is less than the lowest cost price listed on your pricing chart for the same category is calculated by applying to the cost of the garment you are pricing, the percentage markup listed on your pricing chart for the lowest cost price in that category. This is done by subtracting the percentage markup from 100%, and dividing the cost of the garment you are pricing by the difference. The result is your ceiling price. * * *

For example: You have some women's dresses (Category 21) that you bought for $2.75. During the base period you did not deliver any women's dresses costing less than $3.75. Your pricing chart shows you that the selling price at which you delivered the largest number of $3.75 dresses is $5.98. It also shows you that your percentage markup was 37.3%. By applying this same markup in pricing your $2.75 dresses, you find that your ceiling price is $4.39 * * *.

However, if you find that your $3.75 cost price for women's dresses is marked with an (S) you disregard the percentage markup listed for that cost price and find your ceiling price for your $2.75 dresses by applying the percentage markup listed on your pricing chart for the lowest cost price line of women's dresses not preceded by (S).

(iii) *All other garments purchased at cost prices not listed on the seller's pricing chart.* Your ceiling price for a garment whose cost is between the lowest and the highest cost price listed on your pricing chart for the same category, but is not the same as any cost price listed on the chart for that category, is calculated by applying to the cost of the garment you are pricing, the percentage markup listed on your pricing chart for the next lower cost price in that category. This is done by subtracting the percentage markup from 100%, and dividing the cost of the gar-

ment you are pricing by the difference. The result is your ceiling price.

For example: You want to find your ceiling price for women's dresses (Category 21) that you now buy at $7.75. On your pricing chart you have listed women's dresses at cost prices of $6.75 and $8.75, but none at $7.75. To calculate your ceiling price you take the percentage markup listed on your chart for women's dresses costing $6.75. This is 38.4%. You apply this markup to your cost of $7.75 and find that your ceiling price is $12.58 * * *.

(iv) *Adjustment of cost prices to reflect different terms or discounts.* Where you find that a garment which you now purchase has a different cost price from any garment of the same category listed on your pricing chart, and that you bought such garment on terms different from those listed for the next lower cost price on your pricing chart, you must adjust the cost of the garment you are now pricing to reflect the terms listed on your pricing chart for the next lower price, and then, using the adjusted cost, take the percentage markup of the next lower cost price.

For example: The retailer whose pricing chart is shown in Appendix B (a) (1) listed the following cost prices for women's coats: * * * Therefore, in pricing his woman's coat purchased at $19.75 less 3/10 EOM under Rule 2(iii) the seller uses the percentage markup on his next lower cost price. * * * Applying the percentage markup listed for $18.75 cost price (37.4%) to the woman's coat with an adjusted cost of $19.35, he finds that $30.91 is his ceiling price * * *.

(1) **Rule 3.** Your ceiling price for a garment in a category not listed on your pricing chart is calculated by applying Rules 1 and 2 above as if all the cost and selling price lines and percentage markups listed on your entire pricing chart were the price lines and markups for the cate-

gory of garment you are pricing. * * * However, in using Rule 2(i) in such case, you use the average percentage markup for all categories, found by totalling all the cost prices for all categories, and all the selling prices for all categories listed on your pricing chart. Note, also, that in using Rule 2 (iii) you use the percentage markup listed for the cost price next lower than the cost of the garment you are pricing, regardless of category, and in using Rule 2 (ii) you use the percentage markup listed on the chart for the lowest cost price in any category.

For example: You want to find the ceiling price for misses' suits (Category 7) which you now buy at $9.25. You did not list any misses' suits on your pricing chart nor did you list a cost price of $9.25 for any category at all. You did list a cost price of $8.75 for women's dresses (Category 21) which is the next lower cost price listed on your pricing chart for any category. Your pricing chart shows a percentage markup of 37.3% for these $8.75 women's dresses, since the selling price is listed at $13.95. Accordingly, your markup for your $9.25 misses' suits is 37.3%, and your ceiling price is $14.75 * * *.

However, in applying this rule you may find that you have listed the same cost price for more than one category, and that the selling prices and percentage markups listed for that cost price are different for the several categories. In any such case, you must, when applying this rule, use the selling price or the percentage markup which gives you the lowest ceiling price.

For example: In the preceding example you might have found, when pricing the misses' suits which you now buy at $9.25, that on your pricing chart you listed a cost price of $8.75 for both women's dresses (Category 21) and women's coats (Category 1), but that you listed a percentage markup of 32% on the coats and a

percentage markup of 37.3% on the dresses. Using the 32% markup for your $9.25 misses' suits, you would have a ceiling price of $13.60 ($9.25 ÷ 68% = $13.60). If you could use the 37.3% markup, your ceiling price would be $14.75 ($9.25 ÷ 62.7% = $14.75). However, you must take the percentage markup which will give you the lowest ceiling price. This is 32%, and your ceiling price for your $9.25 misses' suits is therefore $13.60.

* * *

SEC. 7. *Records.* (a) You must keep a record showing, for each price established under this regulation, (1) the cost of the garment, (2) the selling price, (3) if you did not price under Rule 1, the percentage markup used in establishing the ceiling price, and (4) the pricing rule under which the ceiling was calculated.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulation involved	2
Statement	3
Argument	5
Conclusion	14
Appendix A	15
Appendix B	22

CITATIONS

Cases:	
Challos v. *Brown*, 136 F. 2d 490	10
Collins v. *Porter*, No. 393, October Term, 1945	5
Consolidated Water Power and Paper Co. v. *Bowles*, 146 F. 2d 492	10, 12
Deposit Bank v. *Frankfort*, 191 U. S. 499	9
Flett v. *Bowles*, 142 F. 2d 559	12
Gillespie-Rogers-Pyatt Co. v. *Bowles*, 144 F. 2d 361	10
Hawaii Brewing Corp., Ltd., 148 F. 2d 846	10
Hillcrest Terrace Corporation v. *Brown*, 137 F. 2d 663	12
Lakemore Co. v. *Brown*, 137 F. 2d 355	10, 12
Jo Van Der Loo v. *Porter*, No. 9325, pending in the Court of Appeals for the District of Columbia	4
Pfeiffer Brewing Co. v. *Bowles*, 146 F. 2d 1006, certiorari denied, 324 U. S. 865	12
Porter v. *Jo Van Der Loo*, No. 9324, pending in the Court of Appeals for the District of Columbia	4
Reed v. *Allen*, 286 U. S. 191	9
Southern Pacific R. R. v. *United States*, 168 U. S. 1	6
United States Gypsum Co. v. *Brown*, 137 F. 2d 803	12
United States v. *Moser*, 266 U. S. 236	6
Statute and regulations:	
Emergency Price Control Act, 56 Stat. 23, 50 U. S. C. App. Supp. V, 901, *et seq*	15
Maximum Price Regulation No. 580	12
Maximum Price Regulation No. 330	2, 22
Miscellaneous:	
Statement of Considerations Accompanying Amendment 5 to Maximum Price Regulation No. 330	13, 24

720086—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 567

JO VAN DER LOO, PETITIONER

v.

PAUL A. PORTER, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Emergency Court of Appeals (R. 45–48) has not yet been reported. The Administrator's opinion accompanying the order denying the protest appears at R. 23–27.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on September 5, 1946 (R. 49). The petition for a writ of certio-

rari was filed on October 4, 1946. The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act, c. 26, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. V, 924 (d), (herein sometimes termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTIONS PRESENTED

1. Whether the United States Emergency Court of Appeals, in a proceeding under Section 204 of the Act, is bound by a judgment of a district court interpreting a regulation in an enforcement proceeding involving the same parties.

2. Whether Revised Maximum Price Regulation No. 330, establishing retailer's and wholesaler's prices for women's, girls', children's and toddlers' outerwear garments, was valid prior to the issuance of Amendment No. 5 on April 11, 1946.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, are set out in Appendix A, *infra,* pp. 15–21. R. M. P. R. 330 and Amendment No. 5 appear in the Federal Register (9 F. R. 11350 and 10 F. R. 331, respectively). The pertinent parts of the Regulation and the Statement of Considerations to Amendment No. 5 are set out in Appendix B, *infra,* pp. 22–26.

STATEMENT

This proceeding was instituted by a protest filed by the petitioner, on June 13, 1945, against the provisions of Revised Maximum Price Regulation 330, Appendix, *infra,* pp. 22–24 (R. 1–4). The petitioner protested against those provisions of the Regulation which required her to sell at prices which she had applied to the largest number of delivered garments of the same cost and in the same category during the base period between August 1 to December 31, 1941 (R. 1, 23). She stated that during the base period she found herself with an unbalanced and slowly moving inventory, and that upon expert advice (R. 5, 11), she liquidated her then inventory at greatly reduced prices. She also put damaged, soiled, and faded goods on sale (R. 7–8). "In many instances these sales prices were below the cost prices of the garments". (R. 2.) As a result, her pricing chart, prepared pursuant to the provisions of Revised Maximum Price Regulation 330, contained categories with selling prices which she was required to take as her ceiling prices and "which are either below cost or so slightly above cost as to render the handling of garments in such cost lines unprofitable." (R. 2–3.)

Following the issuance of the Regulation, the petitioner requested of the Office of Price Administration an interpretation of R. M. P. R. 330

(R. 7–8), and, on April 25, 1945, she was advised that, under the Regulation, she was required to continue the markups she had used during the base period without regard to whether they were abnormally low (R. 9–10).

The petitioner's protest was denied by the Administrator on February 12, 1946 (R. 22). While the protest was pending, however, the Administrator filed suit in the District Court of the United States for the District of Columbia, in which he sought an injunction and treble damages against the petitioner, charging her with violations of R. M. P. R. 330. On January 3, 1946, the district court entered judgment enjoining the petitioner from violating the provisions of the Regulation but refused to assess damages against her (R. 31–32).[1] On March 7, 1946, the judgment of the district court was stayed for a period of thirty days from that date to permit the petitioner to file in the Emergency Court of Appeals a complaint against the Price Administrator, objecting to the validity of R. M. P. R. 330. At the same time, the district court issued a temporary injunction effective during the stay. (R. 38–39.)

Petitioner filed her complaint in the Emergency Court of Appeals on March 15, 1946 (R. 31–36), and the Administrator filed his answer on

[1] Appeals from this judgment, by both the Administrator and the petitioner, are pending in the Court of Appeals for the District of Columbia. *Porter* v. *Jo Van Der Loo*, No. 9324; *Jo Van Der Loo* v. *Porter*, No. 9325.

April 8, 1946 (R. 39–41). On September 5, 1946, the Emergency Court of Appeals filed its opinion in which it held that the district court's interpretation of R. M. P. R. 330 was binding on it, and that R. M. P. R. 330, as so interpreted, was valid (R. 45–48). On the same day, judgment was entered dismissing the complaint (R. 49).

ARGUMENT

1. Petitioner's first contention is that the court below did not give proper effect to the decision of this Court in *Collins* v. *Porter,* No. 393, October Term, 1945 (Pet. 3, 17). This Court there held that a protestant was entitled to a decision by the Emergency Court of Appeals on the applicability of a price regulation while a treble damage proceeding was pending in a district court. It did not hold, however, that a protestant was so entitled even after the district court had entered judgment. This is the relief the petitioner now seeks and the opinion of this Court in the *Collins* case makes it perfectly clear that it is not now available. It was there stated that (slip opinion, p. 2):

> * * * in the event that the Emergency Court had found the regulation inapplicable and such decision had been made *before a judgment* was rendered in the District Court, its ruling would be binding upon the District Court. Under § 204 (e) (2) (ii), consideration of a protest under § 203 (a)

> is not a ground for staying the proceedings in the District Court, since the protest proceeding did not precede the suit in the District Court; and under the same provisions of the Act *determination of the protest proceeding under § 203 (a) can have no retroactive effect once the District Court has entered its judgment.* But the opportunity for securing a decision from the Emergency Court through the protest proceeding *before a judgment* in the District Court is entered, has practical significance and makes this a living and not a hypothetical controversy. [Italics supplied.]

At the time the Emergency Court was asked to consider the issue of interpretation in the *Collins* case, the district court had not entered any judgment, and consequently, a final determination of that issue by the Emergency Court would have been binding upon the district court under the doctrine of *res judicata*. *United States* v. *Moser*, 266 U. S. 236; *Southern Pacific R. R.* v. *United States*, 168 U. S. 1, 48. In this case, however, the district court had entered its judgment before the Emergency Court was faced with the issue of interpretation. It would have been entirely purposeless for the Emergency Court, under these circumstances, to have gone into the question of interpretation anew, because, as this Court stated in the *Collins* case, the Emergency Court's determination "can have no retroactive effect once the District Court has entered its judgment."

This Court's statement that the Emergency Court's ruling as to applicability would have been binding upon the district court had such a decision been made "before a judgment was rendered in the District Court," necessarily recognizes that such a decision would *not* have been binding upon the district court if it had already entered its judgment.

If the Emergency Court had gone into the issue of interpretation anew and reached a conclusion contrary to that of the district court, it would not have gone into the question of the Regulation's validity. This would simply have deprived petitioner of her opportunity to get a decision on validity without helping her in the enforcement proceeding. As the Emergency Court stated (R. 47): "It is to assure a complainant in this court his right to a decision as to the validity of a regulation, that we accept the interpretation of the District Court."

The petitioner asserts that the Administrator's interpretation of the Regulation is, in effect, an order of the Administrator, becomes a part of the regulation, and that "if the Emergency Court decided that the interpretation contended for by the Administrator was invalid, it would to that extent find the Regulation as interpreted to be invalid." It concludes that "The interpretation of the Regulation, therefore, is under the exclusive jurisdiction of the Emergency Court, and it was wrong

720086—46——2

in renouncing its jurisdiction in favor of the District Court." (Pet. 14.) This argument is fallacious. While an administrative agency's interpretation of its own regulation is entitled to great weight, it is but an interpretation and not a retroactive amendment of the regulation. Were this not the case, there could never be an issue as to interpretation, either in the enforcement court or the Emergency Court, because the Administrator's complaint in an enforcement action would constitute an interpretative "order" and the Emergency Court alone would have jurisdiction to consider its validity. That there is a difference, however, between questions involving the construction of language of a regulation and the validity of the regulation as construed appears to be so obvious as to require no argument.

The petitioner also argues that there was no record basis for the Emergency Court's premise that the district court had decided the question of interpretation (Pet. 14–15). The record basis, however, is adequate. The petitioner stated in her complaint (R. 32) that:

> On January 3, 1946, said District Court entered judgment enjoining complainant as defendant from violating the provisions of said Revised Maximum Price Regulation No. 330, but refusing to assess damages against her.

As the Emergency Court pointed out in its opinion (R. 47–48), in issuing such an injunction, the

district court necessarily interpreted the regulation to limit the petitioner in some instances to ceiling prices at or below cost because the injunction limits petitioner to the markups set forth in her pricing chart; and the temporary injunction which appears in the record in this case supports this conclusion (R. 38–39).

The petitioner also argues that it was improper for the Emergency Court to consider and review the district court judgment since it resulted from an entirely separate proceeding (Pet. 14, *semble*). The Emergency Court did not "review" the district court judgment; it merely analyzed it to determine the litigated issues—the normal course pursued by every court in determining the applicability of the doctrine of *res judicata*.

The petitioner's final assertion on this point is that she is in "somewhat better position than the *Collins* case" (Pet. 17), since, in that case, the district court proceeding antedated the institution of the protest proceeding, whereas, in this case, the situation is reversed. Here, again, the argument completely ignores the doctrine of *res judicata*. It is not the initiation of a proceeding but its termination in a judgment that is determinative.[2]

---

[2] The fact that an appeal was pending from the judgment of the district court is irrelevant to the question of the applicability of the doctrine of *res judicata*. The district court judgment operated as a bar to the relitigation of the issue of interpretation of the Regulation. Cf. *Reed* v. *Allen*, 286 U. S. 191, 199; *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 520.

2. Petitioner has not attacked the Regulation as not being generally fair and equitable. In any event, the earnings of the industry preclude such an attack (R. 26). See *Gillespie-Rogers-Pyatt Co.* v. *Bowles,* 144 F. 2d 361 (E. C. A.). Petitioner's complaint is, rather, that the Regulation placed her at a competitive disadvantage in that twenty-nine of her ninety-two base period cost price lines were frozen to unprofitable maximum selling prices (R. 28–29). The issue thus presented is whether the Regulation, undisputedly generally fair and equitable, was rendered arbitrary and capricious because of its effect on an individual seller.

The instant Regulation is of the "freeze" type which has repeatedly received judicial approval. *Chatlos* v. *Brown,* 136 F. 2d 490 (E. C. A.); *Consolidated Water Power and Paper Co.* v. *Bowles,* 146 F. 2d 492 (E. C. A.); *Hawaii Brewing Corp., Ltd.* v. *Bowles,* 148 F. 2d 846 (E. C. A). It has been recognized that such a regulation, freezing the price structure of an industry as it existed during a particular base period, may leave some individuals in less advantageous positions than others. Such regulations are not thereby rendered invalid. *Lakemore Co.* v. *Brown,* 137 F. 2d 355 (E. C. A.).

The facts in this case warrant no different conclusion. The base period of the Regulation

consists of the five months from August 1 to December 31, 1941. The maximum selling price for a cost price line is the price at which the largest number of garments in the cost price line were sold during that period by the individual seller. See Appendix B, *infra,* pp. 22, 24. It was reasonable to assume that during so lengthy a base period, including the peak of the fall selling season, a merchant's normal operations and normal markups would be reflected in the selling prices at which he sold the largest number of garments.

Petitioner's difficulty is alleged to have resulted from an extraordinary clearance sale running throughout the five months of the base period (R. 2). No suggestion has been made that the base period was unrepresentative or that it was too short. On the contrary, petitioner's objection, essentially, is that the Administrator should have so tailored the regulation as to avoid leaving any one of the many thousands of merchants subject to its control in a position of competitive disadvantage,[3] which may have resulted from the fact that the Regulation froze him to maximum prices no higher than the prices at which he elected to sell during the base period. The Emergency Price Control Act imposes no such burden

[3] Upon this record, petitioner has not demonstrated that in fact she has suffered either competitive disadvantage or hardship (R. 26, 48).

upon the Price Administrator. *United States Gypsum Co.* v. *Brown,* 137 F. 2d 803 (E. C. A.); *Pfeiffer Brewing Co.* v. *Bowles,* 146 F. 2d 1006 (E. C. A.), certiorari denied, 324 U. S. 865; *Lakemore Co.* v. *Brown, supra.*

Petitioner has cited *Consolidated Water Power and Paper Co.* v. *Bowles,* 146 F. 2d 492 (E. C. A.); *Flett* v. *Bowles,* 142 F. 2d 559 (E. C. A.) and *Hillcrest Terrace Corporation* v. *Brown,* 137 F. 2d 663 (E. C. A.) in support of her attack upon the regulation (Pet. 20). As the Emergency Court of Appeals stated (R. 48), "Though relief was granted in these cases against competitive injustices established by a regulation, the problem in each involved either a concern which appeared to be representative of a class or a regulation which itself had dealt with individual concerns. We find neither of these situations in the present case."

Petitioner argues that the absence of an adjustment provision [4] rendered the regulation arbitrary and capricious. She points to Amendment 5 to the Regulation, which afforded petitioner and others prospective relief, as demonstrating the

[4] Petitioner's reference to the adjustment provision in Maximum Price Regulation No. 580 is irrelevant. That regulation has a base period of one day which could easily fail to reflect a seller's historical practice. There is thus no basis for comparison of that Regulation with Maximum Price Regulation No. 330, which has a five month base period.

feasibility of making similar provisions *ab initio*.[5] It is submitted that a complete answer to this contention was made by the Emergency Court of Appeals (R. 48):

> This contention ignores the changing conditions of our economy and fails to recognize the purpose of the protest procedure provided by the Emergency Price Control Act. This Act recognizes the difficulties confronting the Administrator in times of threatened inflation and does not require of him superhuman foresight. We think it may be agreed that if a regulation appears on its face to create a situation which reasonably will be expected to impose hardships upon an industry, the Administrator will be found to have acted arbitrarily and capriciously and the regulation held invalid. But on the other hand, if the regulation on its face appears fair, it is not to be held invalid simply because it eventuates, upon further consideration, that some in an industry were found to have suffered hardships. One of the reasons for granting the right to file protest proceedings before the Administrator was to give opportunity to

[5] The fact is that, upon consideration of petitioner's protest, the Administrator caused a general survey to be instituted (R. 26). This revealed that some merchants were dropping cost lines having unsatisfactory markups. To remove this impediment to distribution, an escape was provided from unprofitable markups. See Statement of Considerations Accompanying Amendment 5 to Maximum Price Regulation No. 330, Appendix B, *infra*, pp. 24–26.

> the Administrator to reexamine a regulation with a view of determining whether it should be amended so as to deal more equitably in the future. It was not expected that amendments would operate retroactively or that they would be held to establish or admit invalidity of the original regulation.

Under all the circumstances it is submitted that the Emergency Court of Appeals was correct in determining that there was "nothing arbitrary or capricious in the Regulation as originally drawn." (R. 48.)

CONCLUSION

The decision below is correct, and there is no warrant for further review. The petition, therefore, should be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

RICHARD H. FIELD,
General Counsel,

CARL A. AUERBACH,
Associate General Counsel,

WILLIAM R. MING, JR.,
Chief, Court Review Price Branch,

ISRAEL CONVISSER,

IRVING J. HELMAN,
Attorneys, Office of Price Administration.

NOVEMBER 1946.

APPENDIX A

The pertinent provisions of the Emergency Price Control Act, 56 Stat. 23, 50 U. S. C. App., Supp. V, 901, *et seq.*, are as follows:

REVIEW

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such com-

plaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the

Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(e) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. *Two judges shall constitute a quorum of the court and of each dicision thereof.*[1] The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of

[1] Added by sec. 107 (a) of the Stabilization Extension Act of 1944.

cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation, or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision

of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e)[2] (1) *Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205* ***of this Act or section 37 of the Criminal Code,***[3] *involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated* ***or conspired to violate.***[3] *The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of*

[2] Entire subsec. (e) added by sec. 107 (b) of the Stabilization Extension Act of 1944.

[3] Added by sec. 6 of Pub. Law 108, 79th Cong., 1st sess. (1945).

the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 ***of this Act or section 37 of the Criminal Code,***[4] *involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—*

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205 ***of this Act or section 37 of the Criminal Code,***[4] *setting forth objections to the validity of such provision which the court finds to have been made in good faith; and*

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the

[4] Added by sec. 6 of Pub. Law 108, 79th Cong., 1st sess. (1945).

time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 **of this Act or section 37 of the Criminal Code;**[5] *nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.*

[5] Added by sec. 6 of Pub. Law 108, 79th Cong., 1st sess. (1945).

APPENDIX B

Revised Maximum Price Regulation 330, issued on September 13, 1944, provides in relevant part as follows (9 F. R. 11350):

> SEC. 2. *How to find your ceiling prices under this regulation*—(a) *Explanation of rules.* You find your ceiling price under this regulation by calculating the markup which you took on garments you delivered during the "base period", and then applying that markup to the cost of the garments you are pricing. You find what the "base period" markup is by using one of the pricing rules which are given in section 4.
>
> * * * * *
>
> (c) *What is the "base period."* The base period is very important because you must figure your mark-up from your deliveries of garments during that period.
>
> (1) *For sales of toddlers' garments, or blouses under size 30, or slacks and slack suits.* (i) The "base period" for all garments in categories 5a, 10a, 15a, 20a, 25a, 26a, 26b, and 32–39 is the period between August 1 and December 31, 1942 for retailers and the period between July 1 and October 31, 1942 for wholesalers.
>
> * * * * *
>
> (2) *For sales of garments in all other categories.* (i) The "base period" for retailers is the period between August 1 and December 31, 1941; for wholesalers, it is

the period between July 1 and October 31, 1941.

* * * * *

SEC. 3. *Pricing charts.* * * * On or before October 15, 1944, every seller subject to this regulation (except sellers who apply under section 5 and sellers who are members of chains which have received orders authorizing uniform pricing from the OPA), must file two signed copies of a pricing chart with the Office of Price Administration at the district office having jurisdiction over the area in which the seller is located. You must keep a copy of the pricing chart for your own use. On and after November 15, 1944, you may not sell or deliver any garments subject to this regulation unless you have received an acknowledgment from the OPA of the filing of your pricing chart as required by this section.

(a) *How to prepare a pricing chart.* Each pricing chart must contain the following:

* * * * *

(4) A list of the categories you delivered during your base period.

(5) A list of the cost prices at which you purchased garments in each of these categories. You must indicate whether this is a unit or dozen price. If you intend to use the exception provided in Rule 1 (section 4 (b) (1)) for any cost prices, such cost prices on your pricing chart should be preceded by the symbol "S".

(6) The discount, terms or allowance at which you purchased the largest number of garments at each cost price listed in (5). (Wholesalers must also include the dis-

counts, terms and allowances on which they customarily sold.)

(7) The selling price at which you delivered, during the base period, the largest number of garments of each cost price listed in (5). If during the base period you delivered an equal number of garments at two or more different selling prices, list the lowest of these selling prices. (Wholesalers must indicate whether this is a unit or dozen price.)

SEC. 4 *Pricing rules*—* * *

(6) *Pricing Rules for garments of a category listed on the seller's pricing chart.* * * *

(1) *Rule 1. Garments purchased at a cost price listed on the seller's pricing chart.* The ceiling price for a garment which has a cost to you the same as a cost price listed for that category on your pricing chart is the selling price listed for that cost price on your chart.

* * * * *

STATEMENT OF CONSIDERATIONS INVOLVED IN THE ISSUANCE OF AMENDMENT NO. 5 TO RMPR 330

Revised Maximum Price Regulation 330 offers no mechanism whereby abnormally low mark-ups on retail charts can be revised. Originally it was deemed unnecessary to provide such relief in view of the long base period and the use of the largest volume of sales of a particular cost line as the determinate of the ceiling price.

In practice, the long base period has served to protect most distributors in their normal mark-ups while at the same time protecting consumers from the inflationary effects which would have occurred had retailers been allowed to use

their initial offering price on each cost line as the determinate of the proper ceiling price.

In certain exceptional cases, the regulation has resulted in freezing extremely low selling prices for certain cost lines and has resulted in these retailers being unable to purchase merchandise from manufacturers because of the "clearance sale" retail price which these retailers would have to use.

The present amendment is designed to remedy this situation by allowing retailers whose charts showed mark-ups 20 or more percentage points below a category average specially computed for the purpose to cross out the selling prices having those mark-ups and to insert selling prices based on the mark-up for the nearest cost line in Table A (Section 5 of the Regulation) opposite the proper cost lines. A nation-wide survey of the RMPR 330 charts filed by retailers with OPA District Offices was conducted to determine whether abnormally low mark-ups could be defined clearly and whether retailers could be provided relief from these low mark-ups without inflating the general level of prices. The results of the survey showed quite clearly that abnormally low mark-ups fell more than 20 percentage points below average category mark-ups and that the 20 percentage point figure could be used as a clear line of demarcation. The survey also showed that the number of stores and the number of cost lines involved in these abnormally low mark-up relationships was sufficiently small to preclude any possibility of a general price rise resulting from the action taken in this amendment. Available trade information showed

that merchandise was not being sold at these mark-ups since retailers affected had dropped purchases of those cost lines. Therefore, the increase in retail prices permitted here cannot be considered as raising actual selling prices of merchandise on the market.

The permission to use Table A mark-ups in place of the abnormally low mark-ups will allow retailers affected to resume purchases of merchandise, since Table A embodies standard cost price line relationships at which manufacturers will sell merchandise to retailers for resale. While these mark-ups may not be as high as mark-ups previously enjoyed by the retailers affected by the action, the mark-ups are standard mark-ups.

However, to prevent a retailer who customarily sold below Table A prices from getting a mark-up out-of-line with his own chart, the amendment also provides that the OPA may reduce the Table A mark-up in such cases.

Issued this 11th day of April 1946.

PAUL A. PORTER,
Administrator.

U. S. GOVERNMENT PRINTING OFFICE: 1946